STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2003
v	No. 228733 Kalkaska Circuit Court
CHRISTOPHER J. HALL, Defendant-Appellant.	LC Nos. 99-001882-FH; 99-001948-FH

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of second-degree criminal sexual conduct (CSC II), the victim being under thirteen years of age, MCL 750.520c(1)(a), one count of obstruction of justice, MCL 750.505, and one count of conspiracy to obstruct justice, MCL 750.157a. The trial court sentenced defendant to concurrent terms of eight to fifteen years in prison for the CSC II conviction, three years and four months to five years for the obstruction of justice conviction, and three years and four months to five years for the conspiracy conviction. Defendant appeals as of right. We affirm.

I. Factual Background

This case presented a credibility contest. The complainant, defendant's daughter, testified that when she was twelve years old she accompanied her father, her stepmother Dondria Hall, and her siblings for a weekend visit to the home of defendant's father and stepmother, Art Hall and Janet Hall. Throughout the day defendant consumed alcohol as the family engaged in various outdoor activities. That evening the complainant was lying on her stomach on the living room floor, watching television along with other members of her family. She had hurt her back earlier that day, and she asked defendant to give her a back rub. While defendant was giving her a back rub on the living room floor, he slid his hand underneath her, and massaged and squeezed her breast for several minutes. When defendant's step-mother told defendant to go to bed, the complainant moved away from defendant. The next day, the complainant told her step-mother, Dondria, about the incident. Defendant apologized to the complainant for drinking and promised that he would not drink as much again. However, defendant did not apologize for touching her breast. Dondria told the complainant not to tell anyone about the incident.

Several months later, the complainant told a school counselor about the incident. As a result, the complainant was interviewed by a detective and a protective services worker from the

Family Independence Agency. The detective and protective services worker scheduled another interview with the complainant the next day. At the second interview, Dondria abruptly arrived and removed the complainant from the school premises. She falsely told the school administration that the complainant had a doctor's appointment. Defendant and Dondria took the complainant to the office of Victoria Easterday, defendant's attorney. Easterday suggested that the complainant write a letter to the detective stating that she had fabricated the allegations against defendant. That evening the complainant wrote the letter under Dondria's supervision. The next day the school officials informed the police that the complainant's parents instructed the complainant not to talk to anyone about the allegations. Several days later, the Family Division of Eaton Circuit Court placed the complainant, her sister, and her step-sister in foster care. Subsequently, the complainant and her sister moved to Kansas to live with their biological mother. Dondria separated from defendant, and later regained custody of the complainant's step-sister.

Art Hall and Janet Hall, defendant's father and step-mother, denied that defendant was intoxicated at the time of the alleged offense. At trial, Janet Hall was impeached with a previous statement that she gave at a police investigation. Janet had informed the police that while defendant was rubbing complainant's back she and Dondria wondered if defendant was fondling the complainant's breast. Janet told the police that she was afraid something like that might have occurred. Janet testified that she did not remember giving such information to the investigating officer. Art maintained that if defendant touched complainant in an inappropriate manner, he did so accidentally. Art denied complainant's allegation that he and Janet told complainant to not cooperate with the authorities.

Defendant testified on his own behalf, and consistently maintained that he did not touch complainant in an inappropriate manner, and that he did not know why complainant made the allegations against him. He denied that he conspired with Dondria and Easterday to coerce complainant to write a false letter. Defendant asserted that governmental agencies had conspired to bring the false charges against him.

II. Analysis

A. Introduction of Irrelevant and Highly Prejudicial Evidence

Defendant argues that he was denied due process and a fair trial by the introduction of irrelevant and highly prejudicial evidence. Specifically, defendant challenges the introduction into evidence of (i) the determination at the child protective proceedings that defendant posed a danger to his children, resulting in the children being subsequently placed in foster care, (ii) prior acts of defendant's sexual misconduct with his other daughter, (iii) an opinion testimony on defendant's sexual misconduct and bad character, and (iv) defendant's alleged drinking problems.

Defendant first argues that the evidence of the child protective proceedings tainted the jury process because the jury was led to believe that another court determined that the allegations made against him were true. Because defendant did not object to the introduction of this evidence, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Evidence is admissible if it is helpful in throwing light on any material point. MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of, inter alia, unfair prejudice or misleading the jury. *Id*. MRE 403 does not prohibit prejudicial evidence, only evidence that is unfairly prejudicial. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. However, because prior acts evidence "carries with it a high risk of confusion and misuse, there is a heightened need for the careful application of the principles set forth in MRE 403." *Id*. Here, defendant's theory of the case was that the alleged incident never occurred but that he was the victim of the governmental agencies that conspired to destroy his family. Defendant's theory of the case necessarily placed at issue the acts of the governmental proceedings in this case. On this record, we find no error. *Carines*, *supra*. This evidence was relevant and admissible.

Defendant next argues that the evidence that he sexually molested his elder daughter was inadmissible as a prior bad act under MRE 404(b), and was not relevant to the charges. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. *Id*.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose other than to prove the defendant's character or propensity to commit the crime pursuant to MRE 404(b), (2) relevant to an issue of fact or consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994). The proper inquiry is not whether the testimony would be more prejudicial than probative, but rather, "whether the probative value is *substantially* outweighed by the risk of unfair prejudice." *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998) (emphasis in original).

The evidence that defendant sexually molested his elder daughter when she was approximately the same age as the complainant was introduced through the testimony of Dondria who had entered into a plea agreement under which the charges against her were to be dismissed in exchange for her testimony in this case. Here, the trial court questioned Dondria and limited her testimony to what was sufficient to fill the gaps in Dondria's previous testimony and the testimony of other prosecution witnesses.[1] The entire evidence of the prior bad act that the trial court allowed into testimony was as follows:

> *DONDRIA*: In 1995, [defendant] was accused [by his eldest daughter, when she was thirteen years old] with sexual improprieties, and I was with him at the time, and the whole family went through a very, very rough road. And we were together, so I knew what the actions would be when [the complainant] made these accusations, and I knew how the road would be traveled.

[1] The trial court decided to admit evidence of the prior bad act after the jury raised several questions following Dondria's testimony.

Nothing about the nature or details of the alleged prior sexual molestation was disclosed to the jury. Importantly, the trial court gave the jury the cautionary instruction on prior bad act evidence immediately before the testimony was admitted into evidence. The court carefully explained that the jury was free only to determine whether the evidence showed Dondria's motivation for her actions in this case. The court warned the jury that it was barred from considering whether the evidence showed defendant's bad character or defendant's propensity to commit the instant crime. Generally, juries are presumed to have followed the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Further, a defendant waives review of the admission of evidence which was made relevant by his own placement of a matter in issue. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Because defendant's theory of the case was that the government conspired to destroy his family, the evidence of the prior bad act was relevant to show the reasons behind the swift actions of the governmental agencies that became involved in the case. Defendant's theory of the case also rested on the assertion that his family was happy and problem-free, except for the intervention of the governmental agencies. This evidence served to rebut that assertion. We conclude that the trial court properly admitted this evidence.

Defendant next argues that the trial court abused its discretion when it admitted the prior bad act partially on the ground that it served to explain to the jury the nature of Janet Hall's impeachment at trial. Our review of the court's ruling with respect to the admissibility of the prior bad act indicates that the court had previously limited the nature of the prosecutor's questioning of Janet. It appears, from the language of the court's ruling, that the court ruled on the matter off the record and the parties failed to ensure that the ruling was properly placed on the record. Because defendant did not contradict or object to the court's assertion that it had previously ruled to limit Janet's testimony, and because defendant failed to properly place the ruling on the record for appellate review, we assume that defendant acquiesced to that ruling. Further, defendant fails to properly brief, argue and analyze this claim. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we decline to address this argument.

Defendant next argues that the evidence of his serious drinking problem at the time of the alleged incident was irrelevant to the charges and constituted an improper attack on his character. Because defendant did not object to the introduction of this evidence, our review is limited to plain error that affected defendant's substantial rights. *Carines*, *supra*. Defendant fails to explain how the admission of the evidence constituted error, and defendant does not show how it affected his substantial rights. Instead, the record shows that the prosecutor introduced the evidence to impeach a number of witnesses with prior inconsistent statements that they had made with respect to the amount of alcohol defendant had allegedly consumed. From our review of the record, we are not persuaded that the admission of this evidence constituted error.

B. Prosecutorial Misconduct

Defendant next raises several instances of prosecutorial misconduct. Because defendant failed to object to any of the alleged instances of misconduct, our review is limited to determining whether there was plain error that affected defendant's substantial rights. *People v*

Schutte, 240 Mich App 713, 720; 613 NW2d 370 (2000). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* at 721. Defendant first asserts that the prosecutor improperly elicited testimony about defendant's failure to testify at the underlying child protective hearing, and then commented on defendant's silence at that hearing during closing argument. Specifically, defendant objects to the following statement made by the prosecutor:

> So again, as you start to think about this government intrusion in the untroubled family think about that, and probably most striking of all was the discovery for all of us that at that process that was portrayed as being so sinister and unfair the Defendant was there with his attorney, who sat there silent and made no objection and made no statement and offered no testimony at all, who stood there and what did he do? Hid from the proceedings, he did not say a word while this was going on. He cowered in fear of discovery for what he had done and what he did that week to try to thwart this investigation. That's what happened that Friday; it was the guilty man in Court being whispered to by his lawyer saying don't get involved in this, they might find something out.

Viewed in context, we conclude that the testimony elicited by the prosecutor and the prosecutor's remarks at closing argument were improper. The United States Constitution and Michigan's 1963 Constitution both provide individuals the right to remain silent to avoid being compelled to serve as a witness against themselves. US Const, Am V; Const 1963, art 1, §17. However, the test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). From our review of the record, we are not persuaded that reversal is required, in light of the overwhelming evidence that was properly admitted from which the jury could find defendant guilty beyond a reasonable doubt. *Graves, supra* at 482. Had the defense raised the issue at trial, any error could have been cured by a timely instruction. Absent an objection, "the judge's instruction that arguments of attorneys are not evidence dispelled any prejudice." *Schutte, supra* at 721-722.

Defendant next argues that the prosecutor denied him due process of law and a fair trial by continually berating his character before the jury. Specifically, defendant asserts that the prosecutor improperly argued that the probate court's decision to place the complainant and her siblings in foster care supported a verdict of guilty in this case. The prosecutor had also argued that both Dondria and the complainant's mother acted as they did because they were familiar with the implications of the criminal case involving defendant's older daughter, that defendant molested his older daughter when she was the same age as the complainant, that defendant's failed marriages and the loss of his children were due to his own character flaws rather than the government's actions, that defendant admitted to have had a serious drinking problem, and that defendant attempted to use his skill as an automobile salesman to convince the jury that he was not guilty when overwhelming evidence indicated otherwise. Defendant contends that the prosecutor's remarks cannot be considered harmless given the closely contested nature of the evidence.

The prosecutor's remarks were not improper. A prosecutor is free to argue the evidence and all reasonable inferences as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Additionally, a prosecutor may argue from the facts and evidence that the defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358,

361; 551 NW2d 460 (1996). Read in context, the prosecutor's comments were grounded on the evidence in this case.

D. Venue

Defendant argues that venue for the charges of obstruction of justice and conspiracy to obstruct justice, in barring the complainant from talking with the authorities and in forcing her to write a letter recanting her allegations, was improper in Kalkaska County. Moreover, defendant argues that the alleged acts could not constitute grounds for the above charges because the acts were not intended to affect any proceeding that was actually pending at the time that they were performed. Defendant also argues that the lack of a pending proceeding made the evidence insufficient to support his convictions of these charges.

Obstruction of justice is an interference with the orderly administration of justice. It embraces a category of separate offenses, one of which is intimidation, coercion, or attempted coercion of a witness. The attempt need not be successful. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). The fabrication of evidence that is material to a proceeding also constitutes obstruction of justice. *People v Jenkins*, 244 Mich App 1, 17-18; 624 NW2d 457 (2000). A person who agrees, understands, plans, designs, or schemes to commit acts which obstructed justice or were intended to obstruct the orderly administration of the law engages in a conspiracy to obstruct justice. *Id*. at 19. Venue with regard to a charge of obstruction of justice is proper in the county in which the legal proceedings intended to be affected was pending even if the acts occurred in a different county. *People v Fisher*, 220 Mich App 133, 146-147; 559 NW2d 318 (1996).

At the time defendant committed the acts which formed the bases for the charges of obstruction of justice and conspiracy to obstruct justice in Eaton County, a charge of CSC II had not yet been filed in Kalkaska County. Nevertheless, the FIA and the police in Kalkaska County had begun a formal investigation of the complainant's allegations to determine whether charges should be filed. See *Jenkins*, *supra* at 17-19. Therefore, we conclude that the venue for the charges of obstruction of justice and conspiracy to obstruct justice was properly laid in Kalkaska County. The evidence showed that defendant conspired with Dondria to bar the complainant from talking with the authorities, and he conspired with Dondria and Easterday to coerce complainant to write a false letter recanting her allegations. We conclude that the evidence was sufficient for a reasonable factfinder to find defendant guilty of the above charges beyond a reasonable doubt.

E. Sentencing

Defendant argues that he is entitled to resentencing because the trial court relied on inaccurate statements in the presentence investigation report (PSIR). Because the offenses occurred before January 1, 1999, the judicial sentencing guidelines applied, as opposed to the statutory sentencing guidelines. MCL 769.34(1). Defendant has the right to the use of accurate information at sentencing, and a court must respond to allegations of inaccuracies. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). However, when the alleged inaccuracies would have no determinative effect on the sentence, the trial court's failure to adequately resolve the matter may be considered harmless error. *Id.*

Our review of the record shows that the trial court did not ground its ruling on the claimed three inaccuracies in the PSIR. Rather, the court indicated that it had reviewed the document submitted by defendant. That document included the corrections to the information in the PSIR. We conclude that the statements characterized by defendant as inaccuracies do not warrant either resentencing or correction of the PSIR. *McAllister, supra*.

Defendant next argues that his sentence is disproportionate. Appellate review of the sentence in this case is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 644; 461 NW2d 1 (1990). An abuse of discretion occurs when a sentence is not proportionate to the seriousness of the offense and the defendant's prior record. *Id*. at 636, 651. Because defendant's minimum sentences were within the applicable judicial sentencing guidelines, they are presumptively proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

In imposing sentence for the three convictions, the trial court stated:

> . . . . I think you have left in your wake a broad and deep band of destruction of your family and of your children and the people who had a right to depend on you. You've let them down very badly.
>
> I listened to the evidence in the case. And I believe that there was sufficient evidence from which the Jury could have arrived at the verdict that it did. That being the case, I am also aware that this is the second occasion that you have been before a court of law as a result of sexual molestation of your children. There is very little known to the law by way of criminal offense that has more lasting impact and more devastation over time than that offense. And for that, you bear the full responsibility.
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> * * *
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> . . . the Court will indicate that the sentence imposed in this case is imposed for the reasons stated by the [sentencing court] on the record, after due consideration of all of the materials submitted to the Court in the presentence report and from the defense.
>
> The sentence[ ] imposed in this case [is] within the guidelines of the State of Michigan.

Defendant argues that his sentence is disproportionate because the trial court failed to take into account defendant's employment, lack of criminal history, and family support. These are not unusual circumstances that overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant further argues that his alcohol problem was not considered by the court, nor the fact that defendant had no prior felony convictions. Defendant also argues that the court did not articulate its reasons for the sentence it imposed with respect to the obstruction of justice and conspiracy to obstruct justice. We conclude that the court's stated reasons for the sentence, and the court's reliance on the sentencing guidelines constituted sufficient explanation of the sentences. This satisfied the

articulation requirement. *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996). Therefore, we conclude that defendant's sentence was proportionate.

F. Ineffective Assistance of Counsel

Defendant argues that trial counsel's failure to object to the challenged evidence and the instances of prosecutorial misconduct deprived defendant the effective assistance of counsel. Defendant asserts that the question of the witnesses' credibility presented a close call in this case, and that but for his trial counsel's errors, he would have had a reasonable chance of acquittal. Because defendant did not move below for a new trial or a *Ginther*[2] hearing, this Court's review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will this Court assess counsel's competence with the benefit of hindsight. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions regarding a theory of the case and what evidence to present are matters of trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a strategy may not have worked does not mandate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). For the reasons previously discussed in this opinion, we conclude that defendant has not demonstrated that he was prejudiced by his trial counsel's performance and has not overcome the presumption that his trial counsel rendered effective assistance.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).